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IN THE

Supreme Court of the United States

October Term, 1963

STEWART-WARNER CORPORATION,
Petitioner,

v.

CANADIAN WESTINGHOUSE COMPANY LTD.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND APPENDIX

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PETITION AND APPENDIX

The Stewart-Warner Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 20, 1963.

OPINIONS BELOW

The memorandum order of the district court (Appellant's Appendix below p. 46) dismissing certain counterclaims and affirmative defenses filed by the respondent, as an intervenor, is not reported. The opinion of the court of appeals reversing the district judge by a divided vote (Appendix A, *infra*, pp. 18-33) is reported at ___ F. 2d ___

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Have the Federal Rules of Civil Procedure abrogated the decision of this Court in *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*,[1] 296 U. S. 53 (1935), and also the principles outlined by this Court in *Columbia Gas v. American Fuel Co.*,[1] 322 U. S. 379 (1944), so that an intervenor in patent infringement litigation can assert, as a matter of right notwithstanding Fed. R. Civ. P. 24(b),[2] counterclaims for patent infringement and unfair competition concerning ten patents and patent applications not involved in the main action?[3]

2. Has a plaintiff in patent infringement litigation, by bringing suit in a district where it could not be sued, waived all objections to venue with respect to counterclaims for patent infringement and unfair competition asserted by a Canadian intervenor, particularly when plaintiff has no patent claim against the intervenor?

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[1] These decisions hold that an "* * * intervenor is limited to the field of litigation open to the original parties."

In *Chandler*, plaintiff claimed defendant infringed plaintiff's *printing press patent*; and the intervenor, who manufactured defendant's *printing press*, was prohibited from filing a counterclaim against the plaintiff alleging infringement of a patent owned by the intervenor and *also relating to a printing press*.

[2] Rule 24(b) provides that—"In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[3] A subsidiary question is—Can an intervenor to an action for patent infringement assert affirmative defenses not pleaded by or concerning the defendant in the main action?

RULES OF PROCEDURE INVOLVED

The pertinent Federal Rules of Civil Procedure, Rule 13 (counterclaims), Rule 14 (third-party practice), Rule 22 (interpleader), and Rule 24 (intervention) are set forth in Appendix B, *infra*, pp. 34-39; and the pertinent Equity Rules, Rule 30 (counterclaims), and Rule 37 (intervention) are set forth in App. B., *infra*, pp. 39-41.

STATEMENT OF THE CASE

The petitioner, Stewart-Warner Corporation, filed its Amended Complaint (Appellant's App. pp. 6-9) in the district court during July 1961 alleging that the defendant, Westinghouse Electric Corporation, infringed United States patent 2,489,305 relating to line tracing equipment. The district court had jurisdiction under the Patent Laws of the United States.

The defendant filed its Answer (Appellant's App. pp. 10-18) alleging that petitioner's patent was invalid, not infringed, and unenforceable because plaintiff has unclean hands.

Pursuant to Order (Appellant's App. pp. 40-41) entered by the district court during February 1962, respondent, Canadian Westinghouse Company Ltd., was permitted to intervene as a defendant. The respondent manufactures in Canada the accused infringing equipment; and therefore, the petitioner did not object to respondent's participation in defendant's defense to petitioner's patent claim.[4]

Because of the great mass of new issues sought to be introduced into the litigation by the intervenor's (respon-

[4] This case is unusual in that the respondent is legally isolated from claims of infringement based on petitioner's United States patent. The respondent is a Canadian corporation having no place of business in the United States. Respondent's manufacture and sale in Canada do not violate petitioner's United States patent, and petitioner's Amended Complaint (Appellant's App. pp. 6-9) is devoid of any allegations that respondent infringes petitioner's patent.

dent's) proposed Answer and Counterclaims (Appellant's App. pp. 23-31), petitioner filed in the district court a Motion to Dismiss and Strike (Appellant's App. pp. 42-43) certain of the respondent's counterclaims and affirmative defenses[1] not pleaded by or concerning the defendant. The motion was based principally on the decisions of this Court in *Chandler & Price Co. v. Brandtjen & Kluge, Inc., supra*, and *Columbia Gas v. American Fuel Co., supra*, and the admonition to the district judge contained in Fed. R. Civ. P. 24(b) against intervention which will unduly delay or prejudice the adjudication of the rights of the original parties.

Litigation which was instituted by petitioner to enforce its patent, and in which petitioner knowingly subjected itself to the defenses and counterclaims of defendant, was sought to be transformed by the intervening respondent, who was immune to and not charged with infringement, into one in which the district court would have had to—

1. determine the validity, infringement, and enforceability of two additional patents owned entirely by the intervening respondent;

2. interpret three patent assignment contracts entered into in Canada, to which petitioner and defendant are not parties, relating to complicated electronic structure described in three Canadian patent applications, make a determination as to whether four of petitioner's patent applications pending in secrecy in the

[1] Petitioner moved to dismiss respondent's Counterclaim for Patent Infringement based on petitioner's alleged infringement of United States patents 2,993,612 and 3,017,552, the entire right, title and interest thereto being owned by the respondent (Appellant's App. pp. 28-29).

Petitioner also moved to dismiss respondent's Counterclaim for Unfair Competition, which is based in material part upon petitioner's allegedly wrongful acts concerning three contracts to which neither the petitioner nor defendant are parties, and a reissue patent application owned entirely by the intervenor (Appellant's App. pp. 27-28).

Petitioner also moved to strike that portion of respondent's Counterclaim for Declaratory Judgment (Appellant's App. pp. 26-27) and the newly injected Affirmative Defenses (Appellant's App. pp. 24-25, Pars. 29 q-v) which pleaded the foregoing allegedly wrongful acts concerning the three contracts and the reissue patent application as reasons over and above those pleaded by the defendant to establish unenforceability of petitioner's patent.

United States Patent Office must be assigned to the respondent, this determination involving the comparison of the three Canadian patent applications with the disclosure of petitioner's four United States applications; and

3. determine whether petitioner has interfered with respondent's rights relating to a reissue patent application owned entirely by the respondent."

Additionally, petitioner moved to dismiss the intervenor's counterclaims in the district court for want of venue on authority of the decision of the United States Court of Appeals for the Second Circuit in *Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., et al.*, 75 F. 2d 472 (1935).

The district court granted petitioner's motion, and an order (Appellant's App. p. 46) was entered during April 1963, which effectively eliminated all new issues sought to be introduced by the intervening respondent. The order, however, did not interfere with the respondent's right to participate fully in the proper defense of petitioner's claim for patent infringement against the defendant.

On appeal the United States Court of Appeals for the Second Circuit reversed the district judge by a divided vote. The majority opinion by Judge Lumbard included a direct renunciation (App. A, *infra*, pp. 26-27) of *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*,[1] *supra*, with the following statement:

> "* * * In any event, to whatever extent *Chandler* may look the other way, the decision in that case was rendered prior to the Supreme Court's enactment in 1938 of the Federal Rules. The Rules, as we have indicated,[2]

[1] "Issues involving a total of ten new patents or patent applications were thus sought to be introduced by the respondent, a new record in the escalation of issues by an intervenor in patent litigation.

[2] This Court's decision in *Columbia Gas v. American Fuel Co.*, *supra*, citing the *Chandler* case with approval in 1944, six years after the Federal Rules of Civil Procedure were adopted, was treated *sub silentio*.

> were designed to permit the speedy and inexpensive litigation of controversies and to maximize the expenditure of judicial resource where possible. Our disposition of this case does no more than aid in the effectuation of this scheme. *Cf. Switzer v. Locklin*, 207 F. 2d 482 (7 Cir. 1953), cert. denied, 347 U. S. 912 (1954)."

The majority opinion also attempted to distinguish this case in part from the *Chandler* decision and the "progeny it has spawned" (App. A, *infra*, p. 26) principally on the ground—"In *Chandler* the counterclaim related to a patent owned by the intervenor and in no way related to the patent claim of the plaintiff."*

The majority also stated (App. A, *infra*, p. 27) that petitioner waived venue because, "The suit was in essence brought against Canadian as well as against Westinghouse and surely it was brought with full knowledge on Stewart-Warner's part that Canadian would probably intervene." The record below contains no support for this conclusion. The intervening respondent was not served with a summons, and the petitioner's pleadings contain no allegations concerning respondent. There was every reason to believe that the giant corporate parent (defendant) could adequately defend itself without the assistance of the intervening foreign subsidiary (respondent) whose operations were outside the scope of petitioner's United States patent. The majority did not see fit to acknowledge expressly that it

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* This statement by the majority was induced by respondent's unfounded statement that since petitioner's patent and the ten patents and applications specified in respondent's pleadings all related to line tracing equipment, *Chandler* did not apply.

The majority statement concerning the patents involved in the *Chandler* case is flagrantly wrong because both the plaintiff's patent and the intervenor's patent in *Chandler* related to PRINTING PRESSES. Judge Learned Hand, when he heard the *Chandler* case below under the caption *Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc.*, *supra*, stated the following regarding these two patents involved in the *Chandler* case at p. 472:

"It is to be assumed that a single press may, and does, include the features claimed in both patents as an invention."

was overruling its earlier decision regarding venue in *Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., supra.*

Judge Friendly dissented on the pertinent ground that the district judge had not abused the measure of discretion lodged in him by Fed. R. Civ. P. 24(b). He stated at App. A, *infra*, pp. 32-33:

> "* * * But 'whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties' is precisely the question which Rule 24(b) entrusts to the trial judge's discretion in deciding whether to permit the entry of an applicant whose 'claim or defense and the main action have a question of law or fact in common.' *The patents that Canadian Westinghouse wished to bring into the case were not patents that would have to be considered as part of the prior art; the applications for them were made some ten years after plaintiff's patent was issued and plaintiff contended with substantial basis that, however much the district judge would necessarily learn of the art in passing upon plaintiff's claim, litigation of the validity and infringement of these later patents would enormously increase the length and complexity of the trial.*" * * * (Emphasis added).

REASONS FOR GRANTING THE WRIT

Review by this Court is warranted because of the major changes in intervention practice contemplated by the majority opinion below which overrules a landmark decision of this Court, and because of the general importance of the questions, which are recurrent.

The majority of the Court below has renounced most of the practical legal standards for the sound administration of intervention practice. When the *Chandler* doctrine is renounced, when it becomes an abuse of discretion for a district judge to dismiss counterclaims which produce an influx of issues which dwarf the main action, and when a

plaintiff by bringing suit against a domestic defendant waives venue with respect to permissive counterclaims asserted by a foreign intervenor against whom plaintiff had no claim—then the way has been opened for the control of litigation by an intervenor, and the district judge and the original litigants can only stand transfixed and suffer the abuse.

When petitioner instituted suit against defendant, Westinghouse Electric Corporation, in July 1961, it believed that it could obtain a final adjudication of its patent claim before the patent expired in November 1966, with a judgment in its favor for injunctive relief. Moreover, petitioner believed that the monetary damages awarded it would substantially exceed the cost of the litigation.

The respondent, by injecting into the main action issues involving ten complicated electronic patents or applications and directed to subject matter developed in excess of ten years after the invention of petitioner's patent, has thwarted petitioner's chance for injunctive relief before the expiration of its patent and has inflated petitioner's prospective litigation expenses to exceed the value of a possible money judgment in its favor. This tactic is calculated to frustrate petitioner's claim short of a judgment on the merits and is exactly the kind of evil which prompted this Court to state in *Chandler* at p. 59:

> "Exclusion from the litigation of that demand is consonant with reason and in the interest of justice. Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill. * * *".

The intervention sought by the foreign respondent was not necessary to the proper defense of defendant. Defend-

ant is a domestic corporation of substantial means which would take no action contrary to the best interests of the foreign respondent. Both defendant and respondent are represented by the same counsel.

(a) The Chandler Doctrine

The principle of the *Chandler* case (1935) by which an intervenor is limited to the field of litigation open to the original parties emanated from a long history of judicial conflict outlined in 4 Moore's Federal Practice Sec. 24.17, pp. 126-135.

The adoption of the Federal Rules of Civil Procedure in 1938 rekindled this conflict, which should have been quelled by this Court's affirmation of the *Chandler* principle in *Columbia Gas Co. v. American Fuel Co., supra*, in 1944 when it was stated at p. 383 regarding intervenor's rights:

> "By its petition and intervention the United States has aligned itself with the debtor's trustees, who are asking only to have appellant's claims rejected. The United States likewise, by its petition in intervention, asked that the District Court adjudge that appellant's claims against the debtors be rejected and that appellants take nothing by them. *As an intervenor the United States was limited to the field of litigation open to the original parties. Chandler & Price Co. v. Brandtjen, Inc.*, 296 U. S. 53, 57-60 and cases cited; *Vinson v. Washington Gas Light Co.*, 321 U. S. 489 * * *" (Emphasis added)

No federal court, prior to the majority opinion below, has expressly renounced *Chandler*. In fact, dissenting Circuit Judge Friendly (sitting on designation with two district judges) in *New York Central Railroad Company v. United States*, 200 F. Supp. 944 (S. D. N. Y., 1961), after analyzing thoroughly the effect of the Federal Rules of

Civil Procedure upon the *Chandler* prohibition against new issues, recognized the continued authority of *Chandler*.[9]

The *Chandler* principle survived all district court adjudications after 1938,[10, 11] many of which expressly held that the Federal Rules of Civil Procedure have not overruled *Chandler*.[11]

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[9] He stated in pertinent part at p. 940:

"The question is how far this was altered by F. R. Civ. Proc. 24, 28 U. S. C. The Committee's Note, *'This rule amplifies and restates the present federal practice at law and in equity', was scarcely a tocsin of enormous change.* Although the rule is more specific than its predecessor as to who may intervene, it says little as to what an intervenor may do; in this respect the important change was the omission of the subordination provision of Equity Rule 37 quoted above. Clearly that did work some broadening of the intervenor's status—as, for example, permitting the very motion to transfer which we are here considering—but, equally clearly, it did not so alter historic concepts as to permit an intervenor to assert a claim against the defendants which was not tendered by the complaint and would be based on a legal theory opposite to the plaintiffs', who, on this new claim, would link arms with the original defendants. Whether or not the elimination of the subordination provision, along with the difference in language in F. R. Civ. Proc. 13 as against Equity Rule 30, would call for a different decision on the precise issue presented in Chandler and Price, *the Supreme Court does not consider everything said in that opinion to have been rendered obsolete by the new Rule, as witness its statement 'As an intervenor the United States was limited by the field of litigation open to the original parties', accompanied by a citation of Chandler & Price, in Columbia Gas & Electric Corp. v. American Fuel & Power Co.*, 322 U. S. 379, 383, 64 S. Ct. 1068, 1071, 88 L. Ed. 1137 (1944). Moreover, as pointed out above, the Chandler & Price opinion was not rested on the subordination provision of Equity Rule 37 but on a definition of 'interest', the very word used in the statute, 28 U. S. C. § 2323, alleged to entitle the New York plaintiffs to intervene in the Maryland suit." (Emphasis added.)

[10] Johnson v. Georgia Power Co., 5 F. R. Serv. 24a.2, Case 4 (N. D. Ga., 1942).

Pierce v. American Communications Co., Inc., 111 F. Supp. 181 (D. C. Mass., 1953).

Hartley Pen Co. v. Lindy Pen Co., Inc., 16 F. R. D. 141 (S. D. Cal., 1954).

See also—

New York Central v. United States, 200 F. Supp. 944 (S. D. N. Y., 1961).

[11] E. G. Staude Mfg. Co. v. Berles Carton Co., Inc., 31 F. Supp. 178 (E. D. N. Y., 1939), 32 F. Supp. 573.

Lempco Products, Inc. v. Simmons, 4 F. R. Serv. 13.12, Case 1 (N. D. Oh., 1942).

Reynolds Pen Co. v. Marshall Field & Co., 8 F. R. D. 314 (N. D. Ill., 1948).

Salem Engineering Co. v. National Supply Co., 75 F. Supp. 993 (D. C. W. Pa., 1948).

Some of the text authorities, however, submit that *Chandler* is no longer the law.[12]

The majority opinion below concluded that Fed. R. Civ. P. 13, 14, 22 and 24 have overruled the *Chandler* prohibition against new issues *without specifying the particular language relied upon in the Rules.* (See Rules 13, 14, 22 and 24, and Equity Rules 30 and 37; App. B, *infra*, pp. 34-41).

But Rule 24(b) concerning intervention embodies the basic tenets of *Chandler* in the following language—

> "* * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

And Rule 14 concerning third-party practice expressly limits the counterclaims assertable by a third-party defendant (whose status the majority below apparently considered analogous to that of an intervenor) against the original plaintiff to those "*arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.*" Similarly, the third-party defendant is restricted to the defenses which the defendant could plead. That is, "*The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim.*" Rule 14 is therefore an express application of the *Chandler* prohibition against new issues to third-party practice.

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[12] Professor Moore at 4 Moore's Federal Practice Sec. 24.17, pp. 128 and 135 expresses the conclusion unsupported by judicial decision that *Chandler* is no longer the law. It is clear, however, that Professor Moore is merely expressing his opinion for at p. 134 he states, "Where discretionary intervention was involved, the few cases to date have followed the old rule" (*i.e. Chandler* prohibition against new issues.)

Likewise, Barron and Holtzoff, Federal Practice and Procedure (Rules Edit.) Vol. 1A, p. 595, Note 23, cite a law review article published in 1942 in 30 Geo. L. J. 348 by the then managing editor of the Federal Rules Service, as authority for the proposition that *Chandler* is no longer the law.

Moreover, the Committee's Notes of 1937 relating to Rules 13 and 24 (See fn. 9, *supra*) belies the massive change in law introduced by the majority opinion below. The Committee's Note to Rule 24 (Intervention) reads as follows:

> "This rule amplifies and *restates* the *present* federal practice at law and in equity" (Emphasis added) 4 Moore's Federal Practice p. 4.

The Committee's Note to Rule 13 (Counterclaim) reads as follows:

> "This is *substantially* Equity Rule 30, broadened to include legal as well as equitable counterclaims" (Emphasis added) 3 Moore's Federal Practice p. 5.

The majority opinion below (App. A, *infra*, p. 27) also invited comparison with *Switzer v. Locklin*, 207 F. 2d 483, (7 Cir. 1953), cert. denied, 347 U. S. 912, apparently to support the contention that *Chandler* is no longer the law. But the court in the *Switzer* case after noting that, "There appears to be some contrariety of opinion as to the rights of a party by intervention as compared to those of an original party. See discussion by the Supreme Court in the *Chandler* case, * * *" stated at p. 487 that it was not deciding the "* * * extent, if any, to which the rights of an intervenor have been liberalized by the Rules of Civil Procedure * * *".

The intervenor in *Switzer* was permitted to file a counterclaim alleging misuse of the *patents* in the main action. This same counterclaim was earlier pleaded by an original defendant. Moreover, the plaintiff's complaint in *Switzer* accused the intervenor by name and deed as having instigated the infringement. Thus, the intervenor in *Switzer* did not plead one new issue, except for the allegation of

damage to it." But the respondent in this case, against whom petitioner has no claim, has introduced issues relating to ten patents or applications not involved in the main action.

The majority opinion was in error when it attempted to distinguish this case from *Chandler* and the "progeny it spawned" (App. A, *infra*, p. 26) because—"In *Chandler* the counterclaim related to a patent owned by the intervenor and in no way related to the patent claim of the plaintiff." But as set forth in footnote 8, *supra*, the plaintiff's patent and the intervenor's patent in *Chandler* both related to paper feed mechanisms for PRINTING PRESSES. And in the progeny, *Johnson v. Georgia Power Co.*, *supra*, the intervenor there attempted unsuccessfully to counterclaim on four patents which were relied upon *as part of the prior art* to invalidate the plaintiff's patent, all of the patents relating to ELECTRICAL CONNECTOR CLAMPS.

The majority opinion also was in error when it attempted to distinguish this case from *Chandler* (App. A, *infra*, p. 26) because, "'[T]here the defendant, as a distributor of the intervenor's equipment, and the intervenor have closely parallel and related interests.'" (Emphasis added).

The term "interest" as used in *Chandler* refers to an *actionable* right of the defendant which would enable the defendant to assert the proposed intervenor's counterclaim if he so chose. Remote "interests", which the defendant may have in the intervenor's counterclaims, and which are only a defendant's *nonactionable bias* in favor of the intervenor over the plaintiff, do not overcome the *Chandler* prohibition against new issues.

"The following pleadings in the *Switzer* case appear in Appellee's Appendix below:

Complaint of Switzer Bros. *et al* ... p. 4
Counterclaim of defendant Chr. Cardboard ... p. 15
Counterclaim of intervenor Radiant Color ... p. 19

This Court stated at p. 59 of *Chandler*:

> "* * * it is plain that the rule does not authorize one given the privilege to intervene as a party defendant to set up and enforce against the plaintiff *a counterclaim not available to the original defendant and in which it had no interest.*"
>
> "* * * The purpose for which permission to intervene may be given is that the applicant may be put in position to *assert a right of his in respect of something there in dispute between the original parties* * * *". (Emphasis added)

The defendant has no legal ownership in the ten patents or application introduced into this litigation by the respondent, and defendant pleaded no allegations concerning these ten patents or applications. There is no dispute between the original parties concerning respondent's ten patents or applications.

The majority opinion below magnified the enormous change in intervention practice occasioned by its overruling *Chandler*, when it also dictated a massive erosion in the measure of discretion accorded a district judge by Rule 24(b). If in an action involving one patent, an intervenor has an absolute right to inject issues involving ten patents or applications because the eleven instruments all presumably relate to the same general subject matter, then probably in every case cited in footnotes 10 and 11 the intervenor would have an absolute right to assert the previously rejected counterclaims and the district judge would be powerless to dictate some semblance of procedural sanity to the litigation.[11]

[11] See *Finck et al. v. Gilman Bros. Co.*, 11 F. R. D. 108 (D. C. Conn. 1951) in which the district judge exercised his discretion under Rule 24(b) to dismiss an intervenor's counterclaim which merely sought to question the validity of additional patent claims of the one patent in suit there; or see *Johnson v. Georgia Power Co.*, *supra*, in which the district judge exercised his discretion under Rule 24(b) to dismiss an intervenor's counterclaim based on four patents already involved in the main action as part of the invalidating prior art.

If adding several months to the trial time and delaying the final judgment on the merits of petitioner's original patent claim for several years, so that petitioner has no chance of obtaining an injunction before the expiration of its patent, does not unduly delay or prejudice the trial of petitioner's claim, then Rule 24(b) is meaningless. It is difficult to imagine a more complex infusion of issues than that contained in the ten complicated electronic patents or applications injected by the intervening respondent in this litigation.[15] This Court has accorded considerable latitude to the measure of discretion assigned a district judge by Rule 24(b). *Allen Co. v. Cash Register Co.*, 322 U. S. 137 (1944), *Sutphen Estates, Inc. v. United States et al.*, 342 U. S. 19 (1951).

(b) Venue

This Court's answer to the question—whether a plaintiff has a venue privilege with respect to permissive counter claims asserted by an intervenor—is particularly important at this time in view of the majority below overruling *Chandler* and eroding greatly the measure of discretion accorded a district judge by Fed. R. Civ. P. 24(b). These important judicial restraints governing the proper scope of permissive intervention, including venue, have been diluted so as to grant an intervenor an absolute right to drown a plaintiff in a sea of new issues in many recurrent litigation situations.

This Court has never decided the question of waiver of venue by a plaintiff with respect to counterclaims inter-

[15] Dissenting Judge Friendly emphasized the departure by the majority below from the usual standards of application of Rule 24(b) when he stated at App. A *infra* p. 20: "* * * If anything, in the light of the wide discretion of the trial court long recognized with respect to permissive intervention, see 4 Moore, Federal Practice ¶¶ 24.01 [4], 24.15 (1963 ed.), this case is a *fortiori* * * *."

posed by an *intervenor*, 3 Moore's Federal Practice, Sec. 13.16, pp. 43-46. This Court held in *General Electric v. Marvel*, 287 U. S. 430 (1932), that a plaintiff suing a *defendant* for patent infringement has waived its privilege to object to venue with respect to a counterclaim for patent infringement asserted by the defendant. Professor Moore states at p. 44 regarding the *General Electric* case:

> "* * * The theory of this case certainly seems sound when applied to counterclaims by a defendant who is an original party, but it is not necessarily applicable when a party intervenes in the action, becomes a defendant, and counterclaims against the plaintiff. For here the plaintiff did not hail the intervenor into court as he did in the *General Electric* case. * * *"

Professor Moore thus pinpoints the crux of the whole venue issue in the present case. He notes that while this issue has not been authoritatively settled by this Court, nonetheless the United States Court of Appeals for the Second Circuit in *Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., et al., supra* (which on appeal to this Court became the *Chandler* case) dismissed the intervenor's counterclaim against the plaintiff for want of proper venue. In *Brandtjen*, Judge Learned Hand distinguished the intervenor's status from that of an original defendant; and he concluded, after a thorough evaluation of the equities, that a plaintiff, suing for patent infringement on a printing press patent, has not waived venue with respect to an intervenor who seeks to counterclaim for patent infringement also on a printing press patent. Accord, *Finck et al. v. Gilman Bros. Co., supra.* The majority opinion below overruled the *Brandtjen* case *sub silentio*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

AUGUSTUS G. DOUVAS,
EDWIN T. BEAN,
Attorneys for Petitioner.

February 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

—o—

No. 92—September Term, 1963.

(Argued October 23, 1963 Decided December 20, 1963.)

Docket No. 28292

—o—

STEWART-WARNER CORPORATION,
Plaintiff-Appellee,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant,

and

CANADIAN WESTINGHOUSE COMPANY LTD.,
Intervenor-Defendant-Appellant.

—o—

Before:
Lumbard, Chief Judge.
Medina and Friendly, Circuit Judges.

Appeal from an order of the United States District Court for the Western District of New York, John O. Henderson, J., which dismissed certain counterclaims and struck certain affirmative defenses raised by an intervenor-defendant in a patent litigation.

Reversed.

Appendix A

Augustus G. Douvas, Chicago, Illinois (Edwin T. Bean and Bean, Brooks, Buckley & Bean, Buffalo, New York, on the brief), for plaintiff-appellee.

Ralph H. Swingle, Pittsburgh, Pennsylvania (Charles K. Rice and Jaeckle, Fleischmann, Kelly, Swart & Augspurger, Buffalo, New York, on the brief), for intervenor-defendant-appellant.

LUMBARD, Chief Judge:

Canadian Westinghouse Company Ltd. (Canadian), an intervenor-defendant in a patent infringement suit brought by Stewart-Warner Corporation against Canadian's parent, Westinghouse Electric Corporation, appeals from an order of the United States District Court for the Western District of New York, dated April 15, 1963, which dismissed certain of Canadian's counterclaims against Stewart-Warner, for patent infringement and unfair competition, and also struck certain of Canadian's affirmative defenses. As we are of the opinion that the district court abused its discretion in dismissing such counterclaims and striking such defenses we reverse the judgment of that court.

To summarize the matters in dispute, we take as true the allegations of Canadian in its moving papers for intervention and in its answer. During some years prior to 1959 Canadian, a corporation with its principal place of business in Hamilton, Ontario, developed a photoelectric line tracer. Among its employees were Frans Brouwer, a product development engineer, Derek Redman, a senior engineering assistant, and John Cheverton, another engineer. Canadian alleges that Brouwer and Cheverton were the inventors of the basic device; in July 1957 they assigned their interests to Canadian, including "all variations thereof, and improve-

ments thereon" which they might thereafter make. One patent application of Cheverton and Brouwer resulted in United States patent #2,933,612, issued in April 1960; and an improvement invented by Brouwer resulted in patent #3,017,552, issued in January 1962. Both patents are owned by Canadian. The photoelectric line tracing equipment manufactured by Canadian is purchased by Westinghouse, its parent by virtue of 76 per cent ownership of Canadian's stock, and is distributed and resold in the United States by Westinghouse. Canadian under its contracts with Westinghouse is obligated to save Westinghouse harmless from patent infringement claims and is required to pay any patent litigation expenses.

Canadian alleges that Stewart-Warner, a Virginia corporation with its principal place of business in Chicago, was not engaged in the manufacture and sale of photoelectric line tracing equipment prior to 1959. In that year it conspired with Brouwer and Redman and Edward L. McDonald, Canadian's senior sales assistant, to obtain the benefits of Canadian's experience, know-how, designs, customers and markets. Stewart-Warner then hired away McDonald and Brouwer in September 1959, and Redman followed in December. Obviously it was only a matter of time before the parties would be embroiled in litigation somewhere in the United States.

Stewart-Warner served its complaint on Westinghouse on July 19, 1961, charging infringement of McLennan patent #2,489,305, issued on November 29, 1949, for an invention relating to a "Photoelectric Curve Following Device" which it had acquired by assignment. Venue was laid in the Western District of New York, where Westinghouse has a regular place of business and where it was alleged that it

had committed acts of infringement. Stewart-Warner sought a preliminary and final injunction against further infringement by Westinghouse "and those controlled by" Westinghouse and an accounting for profits and damages, to be trebled for wilfulness. An amended complaint, served on November 2, 1961, added two counts alleging notice to Westinghouse, and knowing contributory infringement by the sale of photoelectric line scanning heads and "specially adapted electronic amplifier circuitry which constitute a material part of the patented invention, knowing the same to be especially made or especially adapted for use in an infringement" of its patent.

Westinghouse's answer denied the validity of the McLennan patent and denied infringement and contributory infringement. It admitted that Stewart-Warner had written Westinghouse asserting infringement of the McLennan patent by equipment purchased by Westinghouse from Canadian. It also asserted as affirmative defenses that McLennan was not the inventor or the first or sole inventor of the claimed invention; that the claimed invention had been previously patented or described, that it had been practiced and that any differences over the prior art, claimed by McLennan, lacked invention as they were obvious to one skilled in the art. Finally, it alleged that Stewart-Warner came into court with unclean hands by reason of having hired Brouwer, Redman and McDonald away from Canadian. Stewart-Warner's motion to strike these latter allegations was denied in May 1962.

On February 9, 1962, Canadian moved to intervene as a defendant and it attached its proposed answer, which was substantially the same as Westinghouse's answer with re-

spect to the infringement and validity of the McLennan patent, and acts of unfair competition, but it added allegations of additional acts of unfair competition directed against Canadian.

Canadian's proposed answer also counterclaimed for a declaratory judgment that the McLennan patent was invalid, unenforceable, and not infringed. A second counterclaim was based upon Canadian's allegations of unfair competition. Still another counterclaim charged infringement by Stewart-Warner of the two patents originally issued to Cheverton and Brouwer and to Brouwer alone and subsequently assigned to Canadian. Canadian's counterclaims asked the usual relief of injunction, damages for unfair competition, and an accounting for profits and treble damages for wilful infringement of its two patents.

After hearing argument, Judge Henderson on February 23, 1962, granted leave to Canadian to intervene and received its answer and counterclaims. Several months later, in June 1962, Stewart-Warner moved to dismiss Canadian's counterclaim for infringement, its counterclaim for declaratory judgment insofar as it related to the new allegations of unfair competition, and its counterclaim for unfair competition. It also moved to strike those of Canadian's affirmative defenses which related to the additional allegations of unfair competition.

Ten months later, on April 15, 1963, Judge Henderson granted Stewart-Warner's motion without stating any reason for so doing. The grounds upon which Stewart-Warner had moved were that the counterclaims for infringement and unfair competition "improperly attempt to enlarge the issues of the main action and fail to state claims upon which

relief can be granted. * * *" citing *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U. S. 53 (1935), and that "venue is improper because plaintiff neither resides, is doing business, nor committed acts of infringement in the Western District of New York." Stewart-Warner moved to strike Canadian's allegedly improperly affirmative defenses because "these allegations improperly attempt to enlarge the issues of the main action," and they are "immaterial * * * to any defense to the claims in the Amended Complaint."

The dismissal of Canadian's prayers for injunctive relief alleged in its counterclaims for patent infringement and unfair competition is appealable under 28 U. S. C. § 1292(a)(1). *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, 433 (1932); *Telechron, Inc. v. Parisse*, 197 F. 2d 757 (2 Cir. 1952); *Cutting Room Appliances Corp. v. Empire Cutting Machine Co.*, 186 F. 2d 997 (2 Cir. 1951); *Switzer Bros., Inc. v. Locklin*, 207 F. 2d 483 (7 Cir. 1953); cert. denied, 347 U. S. 912 (1954). The striking of the affirmative defenses and the portion of the counterclaims for declaratory judgment which assert those affirmative defenses is so inextricably interwoven with those portions of the order which are clearly appealable that we shall proceed to consider the merits of the entire order.

There is no doubt of the propriety of Canadian's intervention as the manufacturer and vendor to Westinghouse and others of the equipment alleged by Stewart-Warner to be an infringement of its McLennan patent. *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U. S. 53 (1935); *Yale & Towne Mfg. Co. v. Manning, Maxwell & Moore, Inc.*, 91 F. Supp. 106 (S. D. N. Y. 1950); *Western States Machine*

Co. v. S. S. Hepworth Co., 5 Fed. R. Serv. 24b.2, Case 1 (E. D. N. Y. 1941). Thus the remaining and critical question is whether Canadian, being a proper party to intervene in the suit, may assert other related claims against Stewart-Warner.

The order of the district court cannot be sustained on any view of the law. Since the district judge did not state any reason for his decision, we proceed to examine the various grounds offered by Stewart-Warner in support of its motion. First, Stewart-Warner maintains that Canadian's counterclaims and certain of its affirmative defenses would improperly enlarge the field of litigation between Stewart-Warner and Westinghouse. We do not agree.

The issues between Stewart-Warner and Canadian and Westinghouse ought to be settled in one forum and in one suit. The charges and countercharges involve the validity of three patents in the field of photoelectric line scanning and line tracing equipment, whether any party has infringed the patent rights of another, and the legality of certain competitive acts. In determining whether Westinghouse's equipment infringes the McLennan patent, the district judge would necessarily gain the understanding of that machinery which would be required for an adjudication of Canadian's claims of infringement of two patents which allegedly describe substantially similar equipment. Moreover, since the prior art, according to Westinghouse's answer, dates back to 1934, the district judge who heard the original claim would perforce be in a far better position to dispose of Canadian's counterclaims than would a judge totally unfamiliar with the entire field of photoelectric line scanning and tracing equipment. Economy of judicial time, expense

to the parties, the time of witnesses, and every consideration for the proper and expeditious settlement of disputes impel us to a conclusion which would not limit the parties at the outset to one phase of a controversy which has continued over some years and which almost certainly will be disposed of by the federal courts. The counterclaims and affirmative defenses which allege acts of unfair competition, although not directly related to the charges of patent infringement, are an integral part of the chronological background which underlies all aspects of the patent infringement charges. There would be little point in permitting adjudication of Canadian's patent infringement claims and yet prohibiting litigation of unfair competition claims which find their origin in the alleged acts whereby Stewart-Warner was able to manufacture and sell the infringing devices.

The whole tenor and framework of the Rules of Civil Procedure preclude application of a standard which strictly limits the intervenor to those defenses and counterclaims which the original defendant could himself have interposed. Where there exists a sufficiently close relationship between the claims and defenses of the intervenor and those of the original defendant to permit adjudication of all claims in one forum and in one suit without unnecessary delay—and to avoid as well the delay and waste of judicial resources attendant upon requiring separate trials—the district court is without discretion to deny the intervenor the opportunity to advance such claims. In the first instance, the district court's analysis must be accorded great weight. But where, as here, the record makes manifest the desirability of bringing the claims of all parties within the ambit of one litigation, we are compelled to reverse the district court's order.

We place no emphasis upon the fact that the district judge first permitted Canadian to intervene and later granted the motion to dismiss and strike parts of a counterclaim which it had earlier received. What the court could do at the time when intervention was sought it could do later, especially as there is no showing that any prejudice resulted from later reconsideration of the question.

Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U. S. 53 (1935), and the progeny it has spawned are principally relied upon by the appellee. But these cases lend little support to its cause. In *Chandler* the counterclaim related to a patent owned by the intervenor and in no way related to the patent claim of the plaintiff. Moreover, the original defendant in that case, as a solitary consumer of the allegedly infringing device, had no interest whatsoever in the controversy between the plaintiff and the intervenor, whereas here the defendant, as a distributor of the intervenor's equipment, and the intervenor have closely parallel and related interests. In any event, to whatever extent *Chandler* may look the other way, the decision in that case was rendered prior to the Supreme Court's enactment in 1938 of the Federal Rules. The Rules, as we have indicated, were designed to permit the speedy and inexpensive litigation of controversies and to maximize the expenditure of judicial resources wherever possible.[1] Our disposition of this case does no more than aid in the effectuation of this

[1] We have in mind particularly Rule 13, which permits the interposition of compulsory and permissive counterclaims; Rule 14, which relates to third party practice; Rule 22, which permits interpleader, and Rule 24, which permits intervention of right and permissive intervention. While it would be highly undesirable to construe Rules 13 and 24 to permit a permissive intervenor to interpose all permissive counterclaims—however unrelated to the original litigation—the rules we have cited clearly manifest the spirit of modern federal procedure not unduly to restrict the scope of litigation among parties wherever consistent with a speedy and just determination of the controversy.

scheme. *Cf. Switzer v. Locklin*, 207 F. 2d 483 (7 Cir. 1953), cert. denied, 347 U. S. 912 (1954).

Stewart-Warner having chosen to bring the suit in the Western District of New York, we can see no objection to having all these matters passed upon by that court. The suit was in essence brought against Canadian as well as against Westinghouse and surely it was brought with full knowledge on Stewart-Warner's part that Canadian would probably intervene. Thus Stewart-Warner has waived the objection to venue which it advanced as a second ground in support of its motion and which it otherwise would have by reason of its not doing business in the Western District and so far as the record shows not having committed acts of infringement therein. Of course, the district court may deny an intervenor the opportunity to raise permissive counterclaims wholly unrelated to the litigation between the plaintiff and the original defendant. But where, as here, because of the interrelationship of the plaintiff's and the intervenor's claims the interposition of counterclaims may properly be permitted no real prejudice can result to the plaintiff from the denial of his objection to venue. See 3 Moore, Federal Practice 45.

Stewart-Warner's final objection, that Canadian's counterclaims do not state claims upon which relief can be granted, is on its face without substance.

The order of the district court is accordingly reversed.

FRIENDLY, *Circuit Judge* (dissenting):

My brothers' ruling that the order appealed from is an interlocutory order refusing an injunction within 28

U. S. C. § 1292(a) needlessly extends federal appellate jurisdiction over mere practice orders, at a time when increased pressures both in the district courts and in the courts of appeals make this peculiarly undesirable.

From the standpoint of authority, decision depends on whether the case is attracted by *General Electric Co. v. Marvel Rare Metals Corp.*, 287 U. S. 430, 433 (1932), *Cutting Room Appliances v. Empire Cutting Machine Co.*, 186 F. 2d 997 (2 Cir. 1951), and *Telechron, Inc. v. Parissi*, 197 F. 2d 757 (2 Cir. 1952), sustaining the appealability of the orders there under review, or by *National Mach. Co. v. Waterbury Farrel Foundry & Mach. Co.*, 290 F. 2d 527 (2 Cir. 1961), denying it.[1] In *National Machinery*, also a patent suit, the defendant sought leave "to amend its answer so as to assert permissive counterclaims arising out of two patents similar to those on which the plaintiff brought suit"—a request similar to that of Canadian Westinghouse here. Judge Anderson denied leave on the ground that injection of these claims would unfairly prejudice the plaintiff in getting its case to trial. We held that when a refusal to broaden an action to include a claim for an injunction is based neither on the merits nor on a supposed lack of jurisdiction or improper venue, but solely "on the wisdom of consolidating certain claims for trial," it is "not the kind of refusal of an injunction which permits interlocutory review by the Court of Appeals under 28 U. S. C. § 1292(a)(1)." I see no tenable basis for refusing to apply the principle of that decision to a refusal,

[1] Since in *National Machinery* we expressly declined to follow the lead of *Switzer Bros. v. Locklin*, 207 F. 2d 483 (7 Cir. 1953), cert. denied, 347 U. S. 912 (1954), cited by my brothers, I deem it unnecessary to discuss that case or the two Ninth Circuit cases to the same effect which we mentioned. The latter have been at least qualified, if not overruled *sub silentio*, by *Jorgenson Bros. v. Commercial Pacific, Inc.*, 294 F. 2d 768 (9 Cir. 1961).

on similar grounds,[2] to allow an intervenor under F. R. Civ. Proc. 24(b) to seek relief by injunction for patent infringement and unfair competition. If anything, in the light of the wide discretion of the trial court long recognized with respect to permissive intervention, see 4 Moore, Federal Practice ¶¶ 24.10[4], 24.15 (1963 ed.), this case is *a fortiori*—particularly in view of my brothers' sound position that we ought not regard the issue differently than if the district judge had struck the challenged portions of the proposed answer as a condition to granting leave to intervene.

Appealability must turn on the nature of the order—not on the fact that there may have been stronger reasons for what Judge Anderson did in *National Machinery* than for what Judge Henderson did here. The distinction taken in *National Machinery* was between a "refusal" based on an allegedly erroneous conclusion that the law does not permit the claim for an injunction to be heard in the action (as in *General Electric*, *Cutting Room Appliances* and *Telechron*), and one based on alleged abuse of a discretionary power over the scope of the action. Where the order is of the former type, the danger of serious harm from the court's erroneous belief in the existence of a legal barrier to its entertaining a claim for an injunction has been thought to outweigh the general undesirability of interlocutory appeals.[3] The very fact that the

[2] Although it would have been better if Judge Henderson had specified on which of the three grounds stated in Stewart-Warner's motion he was acting, I think it plain, as my brothers also seem to do, that he was relying on improper enlargement of the issues. No basis was presented from which he could possibly have concluded that the patent complaints failed to state claims upon which relief could be granted, and his striking of affirmative defenses demonstrates that he could not have been relying on the argument as to venue—an argument so thoroughly blasted by the *General Electric* decision, *supra*, and many others that it ought not to have been made.

[3] Such an order may likewise have important precedential effect.

second type of order hinges on the trial court's discretion is itself an indication that such orders, relating primarily to convenience in litigation, carry a lesser threat of harm. Just as the scope of review of discretionary orders is narrowed, so also should the occasions for appellate interference be limited. While a "refusal" of the first type will generally remit the party seeking an injunction either to a different district or even to a different system of courts, a discretionary refusal will often require no more than the filing of a separate action in the same courthouse. Such an order does not become appealable merely because, as here, circumstances peculiar to the parties will result in the applicant's having to bring the new proceeding in another district. That, at least, is what we said in the *National Machinery* case, 290 F. 2d 528, where, as examination of the record indicates, precisely that situation seems to have been presented.[4] Unless we are prepared to overrule that decision, this appeal must thus be dismissed for want of jurisdiction.

For reasons already indicated in part, I think the *National Machinery* decision was sound, and that failure to enforce the distinction there made will expand a narrow exception to the final judgment rule, intended for cases of true hardship, to include mere practice orders simply because a pleading contains the talismanic word "injunction" and although the pleader had no intention of seeking interlocutory relief.[5] Reference to history is instruc-

[4] The plaintiff was an Ohio corporation with its principal place of business there. The proposed amended answer did not assert any circumstances that would have allowed the defendant to sue for patent infringement in Connecticut under 28 U. S. C. § 1400(b)—even if, which seems questionable, process could have been served there upon the plaintiff.

[5] That is the case here. Canadian Westinghouse had suffered the alleged unfair competition by Stewart-Warner to go on for three years before it filed the proposed counterclaim, and temporary injunctions in suits for infringement of electronic patents must be the rarest of rare birds.

tive as to the Congressional purpose. In the Evarts Act, the sole exception to the final judgment rule was "where, upon a hearing in equity * * * an injunction shall be granted or continued by an interlocutory order or decree, * * *" 26 Stat. 828 (1891). In such cases the court had brought its force to bear, and the need for immediate appeal was obvious. Four years later the exception was broadened to include cases "where, upon a hearing in equity * * *, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused * * *," 28 Stat. 666-67 (1895). This was because the implications of "the lack of all review over the action of a single judge in denying interlocutory injunctions" "had not been adequately considered," Frankfurter and Landis, The Business of the Supreme Court, 108-09 (1928); although the language is broader, as the *General Electric* case was later to hold, it seems rather plain that Congress was thinking primarily of the case where erroneous denial of a *temporary* injunction may cause injury quite as irreparable as an erroneous grant of one. After a retreat to the original wording in 1900, 31 Stat. 660, the 1895 version was restored in § 129 of the Judicial Code of 1911, 36 Stat. 1134. The reference to "a hearing in equity"—strongly suggesting the pressing of a demand for interlocutory relief—has suffered drafting erosion that has tended to obscure the original aim. The words "in equity" were dropped in 1925 when the section was broadened to include orders modifying or refusing to modify injunctions, 43 Stat. 937, but the omission "was not intended to remove that limitation." *Schoenamsgruber v. Hamburg American Line*, 294 U. S. 454, 457 fn. 3 (1935); *Baltimore Contrac-*

tors, Inc. v. Bodinger, 348 U. S. 176, 180 fn. 6 (1955). Then the words "upon a hearing" fell by one of those unexplained changes in the 1948 revision of the Judicial Code, 62 Stat. 929, which we have been wisely instructed to disregard. *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U. S. 222, 227-28 (1957).

The Supreme Court has characterized this history of the injunction exception to the final judgment rule as reflecting "a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger, supra*, 348 U. S. at 181. An order granting or denying a request for a temporary injunction fits that description. So does an order striking a claim for injunctive relief on the merits or on grounds of jurisdiction or venue since, as said in a case cited in *General Electric*, 287 U. S. at 433, "the greater includes the less." *Naivette, Inc. v. Philad Co.*, 54 F. 2d 623 (6 Cir. 1931). Discretionary practice orders designed to avoid undue delay or confusion in the course of a particular trial do not rise to that level; a determination that a party seeking permissive intervention must press claims for injunction relief in an action of its own presents no compelling need for interlocutory review.

If we had jurisdiction of the appeal, I would affirm. My brothers say that where the relationship between the claims and the defenses of the intervenor and those of the original defendant is sufficiently close to permit adjudication of all claims in one suit "without unnecessary delay," a district judge has no discretion to refuse to allow an intervenor to advance them. But "whether the intervention will unduly delay or prejudice the adjudica-

tion of the rights of the original parties" is precisely the question which Rule 24(b) entrusts to the trial judge's discretion in deciding whether to permit the entry of an applicant whose "claim or defense and the main action have a question of law or fact in common." The patents that Canadian Westinghouse wished to bring into the case were not patents that would have to be considered as part of the prior art; the applications for them were made some ten years after plaintiff's patent was issued and plaintiff contended with substantial basis that, however much the district judge would necessarily learn of the art in passing upon the plaintiff's claim, litigation of the validity and infringement of these later patents would enormously increase the length and complexity of the trial. Although there may have been less warrant for striking the unfair competition claims, this also seems to lie within the discretion of the trial judge, who may have been impressed with the intervenor's slowness in asserting these, see fn. 5, and with the effect of a judgment on the claims he allowed to remain. Refusal by one of the two judges in this busy court, taking into consideration the interests of the plaintiff as F. R. Civ. Proc. 24(b) required, to assume the additional days of trial and of post-trial study needed to dispose of intervenor's counterclaims does not become an abuse of discretion merely because it may require the intervenor to seek out the plaintiff—neither of them being without resources—in another forum and thereby in the end perhaps use more professional and judicial time.

APPENDIX B

F. R. C. P. Rule 13. Counterclaim and Cross-Claim.

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) PERMISSIVE COUNTERCLAIMS. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) COUNTERCLAIM EXCEEDING OPPOSING CLAIM. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) COUNTERCLAIM AGAINST THE UNITED STATES. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) OMITTED COUNTERCLAIM. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) ADDITIONAL PARTIES MAY BE BROUGHT IN. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

(i) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in ac-

cordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 1, 1963, eff. July 1, 1963.)

F. R. C. P. Rule 14. Third-Party Practice.

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the

third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) WHEN PLAINTIFF MAY BRING IN THIRD PARTY. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

F. R. C. P. Rule 22. Interpleader.

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

F. R. C. P. Rule 24. Intervention.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order, administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In

exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C., § 2403.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.)

Equity Rule 30. (Amended May 4, 1925.) Answer—Contents—Counter-Claim.

The defendant by his answer shall set out in short and simple terms his defense to each claim asserted in the bill, omitting mere statements of evidence and avoiding general denials, but specifically admitting, denying, or explaining the facts upon which the plaintiff relies, unless he is without knowledge, in which event he shall so state, and this shall be treated as a denial. Averments other than those of value or amount of damage, when not denied, shall be deemed confessed, except as against an infant, lunatic or other person non compos and not under

guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and cross claims.

When in the determination of a counterclaim complete relief cannot be granted without the presence of parties other than those to the bill, the court shall order them to be brought in as defendants if they are subject to its jurisdiction.

Equity Rule 37. Parties Generally—Intervention.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may

be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of December one thousand nine hundred and sixty-three.

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Harold R. Medina, Hon. Henry J. Friendly, Circuit Judges.

STEWART-WARNER CORPORATION, *Plaintiff-Appellee,*

v.

WESTINGHOUSE ELECTRIC CORPORATION, *Defendant,*
CANADIAN WESTINGHOUSE COMPANY, LTD.,
Intervenor-Defendant-Appellant.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs to the appellant.

A. DANIEL FUSARO
Clerk

25

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IN THE

Supreme Court of the United States

October Term, 1963

No. 806

STEWART-WARNER CORPORATION,
Petitioner,

vs.

CANADIAN WESTINGHOUSE COMPANY LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

For a more complete and accurate statement of the case than is set forth in the Petition (p. 3), the Court is respectfully referred to the statement made by the Court of Appeals in its decision. This is printed as Appendix A to the Petition, and the Court's statement of the case appears at pages 19 to 23.

Reasons for Denying the Writ

1. The Decision Below Is Not in Conflict With Applicable Decisions of This Court

The opinion of the Court below neither "overrules" nor has it "renounced" the case of *Chandler & Price Co.*

v. Brandtjen & Kluge, Inc., 296 U. S. 53 (1935) as Petitioner contends at page 7. The Court below distinguished *Chandler*, both on the facts and on the law. The Court pointed out in the paragraph beginning at the middle of page 24 of Petitioner's Appendix A, that the counterclaims of Canadian Westinghouse are so interwoven with the Stewart-Warner claim against the original defendant, Westinghouse Electric Corporation, and the latter's defenses thereto, that the issues should all be settled in one forum and in one suit.

The Court below distinguished the facts of the *Chandler* case by pointing out (App. A., p. 26) that the counterclaim in *Chandler* "in no way related to the patent claim of the plaintiff" and that "the original defendant in that case, as a solitary consumer of the allegedly infringing device, had no interest whatsoever in the controversy between the plaintiff and the intervenor, whereas here the defendant, as a distributor of the intervenor's equipment, and the intervenor have closely parallel and related interests". The close interest here is further shown by the Westinghouse 76% stock ownership of Canadian Westinghouse.

Another factual difference from *Chandler* is that Petitioner in the case at bar sought an injunction against intervenor in Prayer 1 of its Amended Complaint, (Appellant's App., p. 9) by asking for an injunction against "those controlled by Defendant" whereas in *Chandler* this Court specifically stated that "his bill does not make the intervener a party or allege aught against it" (296 U. S. at p. 59).

Thus, the decision in each case turns on the closeness of the relationship of the intervenor's counterclaims to the plaintiff's original claim and the defenses and counter-

claim of the original defendant, as well as on the extent of the interest of the original defendant in the intervenor's counterclaims. These factors vary from case to case.

On the law, the decision in the *Chandler* case, rendered in 1935, was based on an interpretation of the specific wording of old Equity Rule 30 which has not been in effect for the 25 years since the Federal Rules of Civil Procedure were adopted by the Supreme Court in 1938. The Second Circuit has in no way questioned the status of *Chandler* as an authoritative interpretation of the Equity Rules. It has not overruled *Chandler* in any way.[1]

Chandler was decided under a set of rules materially different in substance and in spirit from the F. R. C. P. here involved. The Court of Appeals pointed out (Pet. App. A., p. 26 and footnote 1) that the present Federal Rules, in Rule 13 on counterclaims, liberalized the practice to permit all related controversies between the parties to be placed in issue in one suit to obtain a speedy and just determination of the controversies. As Circuit Judge Medina remarked at the argument of this case below, the adoption of Petitioner's view would set back Federal practice by a generation.

There is no conflict with the decision of this Court in *Columbia Gas Corp. v. American Fuel Co.*, 322 U. S. 379 (1944). This case was decided *Per Curiam* without oral argument and based only on the jurisdictional statement and the briefs in support thereof and in opposition thereto. The only issue decided by the Supreme Court was that it had no jurisdiction to hear an appeal direct from a District Court under the Expediting Act in a bankruptcy

[1] Dissenting Judge Friendly did not base his dissent on conflict with *Chandler*. Apart from the issue of appealability (not raised in the petition here), Judge Friendly saw the case as involving only the narrow question as to whether, on the facts of this case, the trial judge abused his discretion in striking the counterclaims and defenses.

proceeding where one group of creditors (supported by the United States as an intervenor) claimed that another creditor had violated the antitrust laws and thus could not share in the assets of the bankrupt estate. The statement in support of which the *Chandler* case was cited was *dictum* only. A review of the briefs filed in the Supreme Court in the *Columbia Gas* case shows that no party cited the *Chandler* case, no party cited Rule 13, and no party made any argument with respect thereto. Thus, since the question of the effect of Rule 13 on the doctrine of the *Chandler* case was neither briefed nor argued before the Supreme Court, it cannot be said that this Court gave any consideration to the question which is in issue here, and there can be no conflict with the decision rendered here.

2. There Is No Conflict Between Decisions of Different Circuits

The two Courts of Appeals which have considered the question of the right of the intervening manufacturer of the accused device in a patent suit not only to defend against the infringement charge, but also to counterclaim under Rule 13 against the patent owner, are in accord that counterclaims may be brought to settle other controversies closely related to the complaint brought by the patent owner. The decision of the Second Circuit in the case at bar is in accord with the decision of the Seventh Circuit in *Switzer v. Locklin* (C. A. 7-1953) 207 F. 2d 483, cert. denied 347 U. S. 912. In view of the harmonious decisions in these two Courts of Appeals, each of which handles more patent litigation than any of the other nine Circuits, there is no reason to assume that any conflict between Circuits will arise in the future.

3. There Is No Question of Great Public Importance Nor Any Injustice to be Righted

In view of the factual distinctions from *Chandler* previously pointed out herein, it seems unlikely that this Court would ever reach the first question which the Petitioner alleges the case presents. Even if it did, the fact that only two cases (both in accord) involving this question have reached the Courts of Appeals in the 25 years during which the present Federal Rules have been in effect indicates quite clearly that the question is not a recurrent one of great importance in the administration of federal procedure.

The order appealed from is an interlocutory order dealing with procedure. The Court of Appeals merely held that the controversies relating to photo-electric line tracing devices between Stewart-Warner Corporation, on the one hand, and Westinghouse Electric Corporation and its subsidiary, Canadian Westinghouse Company Ltd., on the other hand, should be decided in one suit rather than in two suits. There is no reason to believe that the ultimate result will be any different where the whole controversy is decided in one suit in the District Court for the Western District of New York, than it would be if the controversy were split into two suits. In fact, the Court of Appeals said that its "disposition of this case does no more than aid in the effectuation" of the purpose of the Rules "to permit the speedy and inexpensive litigation of controversies and to maximize the expenditure of judicial resources" (Pet. App. A., p. 26). It is of no public importance that the issues be split into two suits rather than being tried in one. Indeed, the public interest lies the other way for reasons stated by the Court below.

The second question presented regarding venue is without substantial merit, it being clear that when Petitioner voluntarily came into the District Court of its own choosing, it waived its personal privilege to object to venue with respect to counterclaims. The opinion below so held (Pet. App. A., p. 27), with Judge Friendly using even stronger language saying that Petitioner's argument as to venue was "an argument so thoroughly blasted by the *General Electric* decision, *supra*, [287 U. S. 436, 435 (1932)] and many others that it ought not to have been made" (Footnote 2, p. 29, Pet. App. A). Thus, there is no substantial question as to venue to be decided.[2]

The two questions presented in the Petition (p. 2) could be rendered moot when there is a final decision on the merits in this case. If the lower courts should render a final decision on the counterclaims of Respondent in favor of Petitioner, there will be no need for the questions presented here ever to be decided by this Court.

---

[2] While Petitioner cites Professor Moore's treatise in support of its contention, it fails to inform the Court that Professor Moore's conclusion on the point is in accord with the result reached by the Court below. See 3 Moore, Federal Practice 45.

CONCLUSION

For the three reasons stated, it is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 1964.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 806

LIONEL RICHMAN,

Petitioner in Pro. Per.,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Reply to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California in and for the County of San Bernardino.

This brief replies to contentions of a petition for certiorari to review a criminal case which arose in the County of San Bernardino, California. Petitioner was convicted in the Justice Court, Redlands Judicial District, of violating the parking meter ordinance of the City of Redlands. The court imposed a fine of five dollars ($5.00). Appeal was taken to the Appellate Department of the Superior Court in and for the State of California. In a memorandum opinion issued January 14, 1960, the judgment was affirmed. The petition for review of this opinion was filed on March 21, 1960.

Opinions Below.

The memorandum opinion of the Appellate Department of the Superior Court affirms the judgment of the trial court.

Questions Presented for Review.

1. Do Sections 6244 and 6246 of the Redlands Code raise a presumption which deprives petitioner of his liberty without due process of law, equal protection, or constitute a bill of attainder?

2. Do Sections 6244 and 6246 deprive petitioner of equal protection of the law?

Ordinances Applied to Petitioner by Trial Court.

1. "Section 6225. NONPAYMENT OF METER. It shall be unlawful between the hours of 9:00 a.m. and 6:00 p.m. on any day excepting Sundays and Holidays for any person to cause, allow, permit, or suffer any vehicle registered in his name or operated or controlled by him to be upon any street within a parking meter zone in any space adjacent to which a parking meter is installed at any time during which the meter is showing a signal indicating that such space is illegally in use (other than such time as may be absolutely necessary in entering and leaving such space to operate the meter)."

2. "Section 0311 VIOLATION: MISDEMEANOR. Any person who violates or willfully fails to comply with any provision of this code is guilty of a misdemeanor."

3. "Section 0313. PENALTY. Any person convicted of a misdemeanor under the provisions of this Code (unless otherwise provided herein) shall be punishable by a fine of not more than five hundred dollars ($500.00) or

by imprisonment in the City Jail or in the San Bernardino County Jail for a period of not more than six (6) months, or by both such fine and imprisonment.

Statement of the Case.

The petitioner, Lionel Richman, was accused of violating Section 6225 of the Redlands Parking Ordinance in a complaint filed in Justice Court of the Redlands Judicial District. It alleges as follows:

> "That said Lionel Richman . . . did willfully and unlawfully park that certain automobile, State License 0108980, on a public street in the City of Redlands, to wit: State Street in violation of a parking meter ordinance of the City of Redlands."

The trial court's minute order states that Richman appeared and was represented by his counsel, Lewis Garrett, at the time of arraignment. A true copy of the complaint was delivered to the defendant and read to him; he was asked whether he pleaded guilty or not guilty to the complaint. Without pleading, he made a written motion to dismiss the complaint on the grounds that Sections 6244, 6245, and 6246 of the Redlands Ordinance Code are contrary to the Fourteenth Amendment of the United States Constitution and Article 1, Section 13 of the Constitution of the State of California.

The motion was denied following argument by counsel and review of the points and authorities. Richman entered a plea of not guilty, waived a jury, and requested a court trial. He asked the court to consider the entire record, including the police report, communications and other information as evidence upon which to reach its verdict. The court found that an Austin Healy automo-

bile owned by Lionel Richman was parked overtime on State Street in the City of Redlands on February 28, 1959.

Richman was found guilty of parking in violation of Section 6225 of the Redlands Ordinance Code. The Court pronounced judgment immediately at Richman's request, and fixed a fine of five dollars.

Ordinance Does Not Deprive Petitioner of Due Process or Equal Protection of the Law nor Is It a Bill of Attainder.

The evidence that Petitioner parked his automobile in a metered space longer than the period allowed by the Redlands ordinance is undisputed. The court found the allegations of the complaint are true and entered judgment that the petitioner is guilty of violating Section 6225.

He contends that his conviction under this section is improper because the Redlands Code contains separate provisions which allow overtime parkers to deposit or mail sums to the city and waive court appearance. These sections, which the record shows were not alleged in the complaint or applied to petitioner by the trial court, are as follows:

> "Section 6214. PAYMENT BY VIOLATOR: Time and Amount—Any operator or owner of a vehicle for which a citation has been issued shall pay a penalty in the amount designated by the following schedule in full satisfaction of such violation:
>
> *Schedule*
>
If Paid Within	*Amount*
24 hours	50¢
10 days	$1.00
30 days	$5.00

"Section 6245. MANNER OF PAYMENT: Said payment may be made through receptacles designated for such purpose located within the metered area of the city or in person to the City Treasurer, City Hall, Vine and Cajon Streets, Redlands, or by mailing said penalty to above City Treasurer."

"Section 6246. NON PAYMENT: The failure of such owner or operator to pay said penalty within thirty days (30 days) shall subject such owner or operator to the misdemeanor penalty provided for the violations of the provisions of this code."

According to the petitioner, this procedure establishes a conclusive presumption of guilt from the mere issuance of a citation and that consequently his conviction of violating Section 6225 is contrary to the Fourteenth Amendment. (United States Constitution, 14th Amendment, Sec. 1) and a bill of attainder (United States Constitution Art. I, Sec. 10).

The judgment was based upon uncontradicted evidence. The court did not invoke any presumption of law. For this reason, petitioner's claim that his conviction is based upon an unconstitutional presumption is without merit. The constitutionality of sections other than the specific one under which he was convicted and sentenced is irrelevent in the present case.

One of petitioner's principal arguments is that Section 6246 allows the deposit of sums by violators of petty parking meter regulations, thereby inducing them to waive their right to arraignment and trial. Serving the convenience of persons who have parked overtime is plainly the purpose of the provision. This intention is even more clearly shown by Section 6245, which allows the mailing

or deposit of the charge at a city office. Such a mailing or deposit is not a penalty imposed for a violation of the Redlands ordinance.

The punishment for all misdemeanors is set forth in Sections 0311 and 0313, which provide:

> "Section 0311. VIOLATION: MISDEMEANOR. Any person who violates or willfully fails to comply with any provision of this Code is guilty of a misdemeanor."

> "Section 0313. PENALTY. Any person convicted of a misdemeanor under the provisions of this Code (unless otherwise provided herein) shall be punishable by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the City Jail or in the San Bernardino County Jail for a period of not more than six (6) months, or by both such fine and imprisonment."

Petitioner was sentenced in accordance with these sections of the Redlands Ordinance Code after receiving a fair trial. As the record shows, no presumption was authorized by the ordinance or received as evidence to convict him. There is no legal or factual support for his claim that the judgment rests upon an unconstitutional presumption.

The Provisions Asserted to Be Invalid Are Severable.

Petitioner was convicted and sentenced in accordance with valid provisions of the Redlands Ordinance Code. These provisions are separate from the sections he contends are contrary to the Fourteenth Amendment of the United States Constitution.

Section 0217 of the Redlands Code provides:

> "Section 0217. PARTIAL INVALIDITY. If any chapter, article, section, sentence, clause or portion of this Code is for any reason held to be invalid or unconstitutional by any court, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof."

When the legislative body declares its intent, by a severability clause, that each part of its enactment stand or fall on its own merits, considerable weight is given such a clause. (*People v. Commons*, 64 Cal. App. 2d 925, 148 P. 2d 724, 729; *Lowe v. City Council of Augusta*, 45 Fed. Supp. 143). The rule is well settled, that, where a severability clause is provided, the valid portions of an ordinance will be upheld if the remaining portion is severable and constitutes a completely operative expression of the legislative intent. *Bacon Service Corp. v. Huss*, 199 Cal. 21, 32 (248 Pac. 235).

In *Carter v. Carter Coal Co.*, 298 U. S. 238, 338, 80 L. Ed. 1160, 1203, this court determined that certain provisions of the National Recovery Act were separable and said:

> "(A)ny declaration in respect of their validity or invalidity under the . . . . constitution . . . will anticipate a controversy that may never become real. This being so, the proper course is to withhold any expression of opinion until expression becomes necessary."

We confidently assert that the provision violated by petitioner is a "separate, distinct and independent provision" as defined in the severability clause of the Redlands Code.

It is clear from this record that he did not attempt to bring himself within the provisions he contends are unconstitutional. He made no payment in accordance with either Section 6244 or Section 6246. Only Section 6225, prohibiting overtime parking and subject to the same punishment as other misdemeanor offenses, was applied to him. The constitutionality of Section 6225, standing alone, is unquestioned, and the judgment based upon the trial court's finding of a violation of this municipal law is proper.

Conclusion.

This petition makes the broad charge of unconstitutional encroachments upon the entire population of a municipality because the petitioner was tried and convicted of parking illegally.

Although his procedural rights were meticulously protected through arraignment, representation by counsel, the hearing of a motion to dismiss, entering of his plea, waiver of jury, court trial, proper sentencing and appeal, petitioner accuses the city of having the attitude "that it is too much of a nuisance to grant a trial to one charged with a minor traffic offense . . . . . the traditional contention of over-zealous police authorities." (Pet. p. 10).

Because he cannot show an improper application of the city parking law, petitioner premises his entire argument upon certain unrelated sections of the code which were not alleged in the complaint or applied by the court. These sections are the common provisions allowing overtime parkers to deposit sums of money and discharge their citations. There is no conclusive presumption of guilt raised in these sections. There is nothing in them to prevent any person from contesting the validity of the ordi-

nance or proving his innocence. The fundamental rule of construction in favor of constitutionality and the doctrine of separability compel the conclusion that the Redlands ordinance was properly applied to the petitioner.

For these reasons, no writ of certiorari should issue to the Appellate Department of the San Bernardino Superior Court to review its opinion affirming the lower court's judgment.

Respectfully submitted,

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